

REDACTED DECISION – DK#S 11-091 W, 11-092 C, 11-093 X – BY MATTHEW R. IRBY, ADMINISTRATIVE LAW JUDGE II – SUBMITTED FOR DECISION ON NOVEMBER 28, 2011 – ISSUED ON MAY 22, 2012

SYNOPSIS

TAXATION -- PROCEDURE AND ADMINISTRATION -- It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. § 11-1-2 (West 2011).

WEST VIRGINIA OFFICE OF TAX APPEALS -- BURDEN OF PROOF -- In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the petitioner to show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2011); W.Va. Code R. §§ 121-1-63.1 and 69.2 (2003).

CONSUMERS SALES AND SERVICE TAX/WITHHOLDING TAX/TOBACCO PRODUCTS EXCISE TAX -- LIABILITY AS A SUCCESSOR IN BUSINESS -- It was the duty of Petitioner's predecessor to collect and remit consumers sales and service tax, to pay withholding tax, and to pay tobacco products excise tax. *See* W. Va. Code R. § 110-15-4.5 (1993); W. Va. Code Ann. § 11-21-74 (West 2011); W. Va. Code Ann. § 11-17-5 (West 2011);

CONSUMERS SALES AND SERVICE TAX/WITHHOLDING TAX/TOBACCO PRODUCTS EXCISE TAX -- LIABILITY AS A SUCCESSOR IN BUSINESS -- A successor in business is personally liable for the payment of tax, additions to tax, penalties, and interest unpaid after the expiration of the thirty-day period allowed for payment by the predecessor. *See* W. Va. Code R. § 110-15-4.9 (1993).

CONSUMERS SALES AND SERVICE TAX/WITHHOLDING TAX/TOBACCO PRODUCTS EXCISE TAX -- LIABILITY AS A SUCCESSOR IN BUSINESS -- In order to be determined a successor in business; a person must directly or indirectly purchase, acquire, or succeed to the business or stock of goods of a predecessor. *See* W. Va. Code R. § 110-15-4.9.1 (1993).

CONSUMERS SALES AND SERVICE TAX/WITHHOLDING TAX/TOBACCO PRODUCTS EXCISE TAX -- LIABILITY AS A SUCCESSOR IN BUSINESS -- On its first day of operation, Petitioner acquired substantially all of the business assets and stock of goods of their predecessor company.

CONSUMERS SALES AND SERVICE TAX/WITHHOLDING TAX/TOBACCO PRODUCTS EXCISE TAX -- LIABILITY AS A SUCCESSOR IN BUSINESS -- Petitioner has not carried its burden of proof by showing that the Successor in Business Assessment, for consumers sales and service and use tax, withholding tax, and tobacco products excise tax, issued against it on January 10, 2011, was erroneous, unlawful, void, or otherwise invalid.

FINAL DECISION

On January 10, 2011, the Compliance Division of the West Virginia State Tax Commissioner's Office [hereinafter the Tax Department or the Respondent] issued a Successor in Business Assessment against the Petitioner, Company A. This assessment was issued pursuant to the authority of the State Tax Commissioner, granted to him by the provisions of Chapter 11, Article 10, *et. seq.*, of the West Virginia Code. The assessment stated that Company A was a successor in business to Company B and involved three taxes; withholding, consumer's sales and service and tobacco products excise tax. The withholding portion involved tax in the amount of \$_____, interest in the amount of \$_____ and additions and/or penalties in the amount of \$_____ for a total withholding tax assessment of \$_____. The consumers sales and service tax portion involved two separate assessments; the first involved a tax in the amount of \$_____, interest in the amount of \$_____, and penalties and/or additions in the amount of \$_____ for a total amount of \$_____; the second involved tax in the amount of \$_____, interest in the amount of \$_____ and penalties and/or additions in the amount of \$_____ for a total amount of \$_____. The tobacco products excise tax involved tax in the amount of \$_____, interest in the amount of \$_____, and penalties and/or additions in the amount of \$_____ for a total amount of \$_____. The total assessment was in the amount of \$_____.

The evidence on the record indicated that the Petitioner received a copy of the assessment, by hand delivery, on January 20, 2011. The Petitioner timely filed its Petition for Reassessment with this tribunal on March 7, 2011. Subsequently, after finding good cause to delay an evidentiary due to the Petitioners request that a hearing be held in Bridgeport, an evidentiary hearing was held on July 20, 2011, in Bridgeport, before Administrative Law Judge Christopher B. Amos. Thereafter, the parties submitted briefs containing proposed findings of fact and conclusions of law, the last brief being filed on November 28, 2011, and the matter became ripe for a decision at that time.

FINDINGS OF FACT

1. In 1996, Ms. A began working as a secretary for Company B, a company engaged in the distribution of cigarettes and tobacco products.
2. Ms. A took care of paying the bills, doing the bank deposits, ordering tobacco products, and doing computer work for Company B.
3. Around 2006, Ms. A began signing checks and preparing and signing state tax forms for Company B.
4. At some point in late 2010, due to substantial tax liability, Company B's business registration certificate was revoked. Company B then closed on or about Friday, January 7, 2011.
5. On, or about, December 17, 2010, Ms. A formed Company A, by filing the Articles of Organization of Limited Liability Company with the West Virginia Secretary of State.

6. A business registration certificate for Company A was issued on, or about, January 5, 2011.

7. On, or about, January 11, 2011, Company A began doing business in the same location as Company B.

8. On, or about, January 10, 2011, assessments as successor in liability to Company B were issued to Company A in the amount of \$_____ for Withholding Tax, \$_____, in Consumers Sales and Service Tax, \$_____, in Consumers Sales and Service Tax, and \$_____, in Cigarette and Tobacco Products Tax.

9. Company A engaged in the business of distributing cigarettes and tobacco products to many of the same customers as Company B.

10. Company A acquired the customer list from Company B.

11. Company A acquired the delivery routes from Company B.

12. Company A also engaged in the business of distributing food and other products.

13. Company A “downsized” the distribution of cigarettes and tobacco products upon “taking over” the business from Company B.

14. All retail vendors that Company B serviced, were kept by Company A

15. Company A did not engage in the business of purchasing unstamped cigarettes and affixing such stamps to the cigarettes.

16. There was some leftover product when Company B closed and was taken over by Company A.

17. The same employees that worked for Company B the day it closed began working for Company A, the day it opened.

18. Sometime in early January, 2011, Ms. A ordered tobacco products from U.S. Tobacco and R.J. Reynolds under the name of Company B. This product was to be distributed by Company A.

DISCUSSION

It is noted at the outset, in a hearing before the West Virginia Office of Tax Appeals, on a petition for reassessment, the burden of proof is upon the petitioner to show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2011); W. Va. Code R. §§ 121-1-63.1 and 69.2 (2003). In the instant matter, the sole issue to be determined is whether Company A, is a successor in business to Company B.

To that end, West Virginia Code Section 11-10-11(f) provides, in relevant part:

(f) Payment when person sells out or quits business; liability of successor; lien. --

(1) If any person subject to any tax administered under this article sells out his, her or its business or stock of goods, or ceases doing business, any tax, additions to tax, penalties and interest imposed by this article or any of the other articles of this chapter to which this article is applicable shall become due and payable immediately and that person shall, within thirty days after selling out his, her or its business or stock of goods or ceasing to do business, make a final return or returns and pay any tax or taxes which are due. The unpaid amount of any tax is a lien upon the property of that person.

(2) The successor in business of any person who sells out his, her or its business or stock of goods, or ceases doing business, is personally liable for the payments of tax, additions to tax, penalties and interest unpaid after expiration of the thirty-day period allowed for payment: *Provided*, That if the business is purchased in an arms-length transaction, and if the purchaser withholds so much of the consideration for the purchase as will satisfy any tax, additions to tax, penalties and interest which may be due until the seller produces a receipt from the Tax Commissioner evidencing the payment thereof, the purchaser is not personally liable for any taxes attributable to the former owner of the business unless the contract of sale provides for the purchaser to be liable for some or all of the taxes. The amount of tax, additions to tax, penalties and interest for which the successor

is liable is a lien on the property of the successor, which shall be enforced by the Tax Commissioner as provided in this article.

W. Va. Code Ann. § 11-10-11(f) (West 2010).

This provision of the Code imposes liability on any “successor in business” where the predecessor either sells out its business, sells out its stock of goods, or ceases doing business. To buttress this point, the West Virginia Code of State Rules provides, in pertinent part:

The successor in business of any person, who sells out a business or stock of goods, or ceases doing business, shall be personally liable for the payment of tax, additions to tax, penalties and interest unpaid after expiration of the thirty (30) day period allowed for payment by the predecessor.

W. Va. Code R. § 110-15-4.9 (1993). The rules further define both “successor” and “successor in business” by stating:

2.88. “Successor” or “successor in business” means any person who directly or indirectly purchases, acquires, or succeeds to the business or the stock of goods of any person quitting, selling or otherwise disposing of a business or stock of goods.

W. Va. Code R. § 110-15-2 (1993); *See also* W. Va. Code R. §110-15-4.9.1 (1993).

Thus, in order to be found liable as a successor, a person must, either directly or indirectly, acquire a business or stock of goods. To that end, the rules provide that:

4.9.2. The liability of a successor arises from any sale, transfer, assignment or other acquisition of a business or stock of goods. *A person who purchases or acquires a portion of a business or stock of goods may become liable as a successor where he purchases or acquires substantially all of the business assets or stock of goods of such business.* If two or more persons purchase or acquire a business or stock of goods, their liability, as successor, is in proportion to the value of the business assets or stock of goods acquired by each person.

W. Va. Code R. §110-15-4.9.2 (1993). Therefore, where a person purchases or acquires substantially all of the business assets or stock of goods of a business, successor liability may be established. According to the rules:

4.9.3. The business assets include all assets of a business pertaining directly to the conduct of the business. Business assets include real property or any interest therein; tangible personal property, including fixtures, equipment, machinery, furniture and vehicles; and intangible property, including accounts receivable, contracts, business name, business goodwill, customer lists, delivery routes, patents, trademarks or copyrights. Any asset owned by a corporation is a business asset. "Stock of goods" means the inventory or merchandise that the taxpayer is in the business of selling, but does not include fixtures, equipment, machinery or vehicles used in connection with such business.

W. Va. Code R. §110-15-4.9.3 (1993).

Thus, the primary question to determine is whether the Petitioner acquired substantially all of Company B's business assets or stock of goods. To this end, the Petitioner argues that the evidence shows that Company A did not succeed to the business of Company B because they did not acquire or purchase fixtures, equipment, machinery, furniture, accounts receivable, contracts, patents, trademarks, copyrights or other assets from Company B.

However, the evidence in the case shows the contrary. In the instant case Company B ceased doing business on January 7, 2011. According to Ms. A, Company B had disposed of nearly all the business assets upon closing. A mere four days later, Company A opened their doors in the same business location, and engaged in substantially the same line of business while acquiring from Company B.

- 1) The same delivery routes.
- 2) Company B's customer lists.
- 3) Company B's customers.
- 4) The ability to order tobacco products under the name of Company B.¹

5) Company B's employees.

6) Some leftover product².

Ultimately, the Petitioner "took over"³ for Company B. As noted above, Company A acquired substantially all of the business assets, including the customer lists and delivery routes of Company B, and the Petitioner held itself out as Company B to further its own business. Thus, Company A acquired or succeeded to all or substantially all of the business assets of Company B.

Next, the Petitioner argues that in order to succeed to the business of another, some financial or other consideration must pass between the two entities. The Petitioner references a Decision issued by this tribunal for this proposition. In that decision Judge Piper states:

When these two (2) legislative regulations are read together, along with the related statute, W. Va. Code Ann. § 11-10-11(f)(2), as amended, it is obvious that, to find successor liability, there must first be some form of consideration passing from the alleged successor to the alleged predecessor, and there must be a succession to all or substantially all of the business assets or stock of goods of the business. Stated another way, merely operating the same or a very similar type of business in the same (or essentially the same) business location as the alleged predecessor business does not, by itself, automatically create successor liability.

Docket No. 08-066 C, issued September 9, 2008

¹ As noted in the facts above, the Petitioner used her position at Company B to order tobacco products. The Petitioner discounts this testimony as unimportant because Ms. A only testified to this arrangement on one occasion. However, the fact that she was holding Company A out as Company B prior to opening the doors of the business is important in determining whether the business should be considered a successor.

² Ms. A's testimony on this fact was inconsistent at best. Ms. A testified initially that there was some unstamped product remaining when Company B closed. Later Ms. A testified that they had "sold it all out", referring to the remaining product. However, Hudson Yates, a Tax Department employee, testified that Ms. A told him that Company A purchased the inventory from Company B.

³ Ms. A testified that "I kind of downsized whenever I took the business over." According to Ms. A the issue of "downsizing" does not refer to losing customers of Company B, they just combined the delivery route but retained the same customers. Also, on this issue of downsizing, Ms. A confused Company B and Company A, referring to both synonymously as "we".

However, the statute clearly provides for liability where they are “[th]e successor in business of any person who sells out a business or stock of goods, *or ceases doing business.*” W. Va. Code Ann. § 11-10-11(f)(2) (West 2010) (emphasis added). As the Supreme Court of West Virginia has stated, “[i]t is a well-known rule of statutory construction that the Legislature is presumed to intend that every word used in a statute has a specific purpose and meaning.” Foster Found. v. Gainer, 228 W.Va. 99, 717 S.E.2d 883, 894 (2011). Additionally, the Court has stated as fundamental, “the canon of statutory construction which holds that terms of the same statute are not to be construed so as to be redundant.” Banker v. Banker, 196 W. Va. 535, 544, 474 S.E.2d 465, 474 (1996).

The statute at issue in the instant case provides for liability where there is a sale, or merely where a predecessor “ceases doing business.” If we were to determine that in order to establish successor liability under the statute, there must be some consideration passing from the successor to the predecessor, the necessity of the words “or ceases doing business” would be determined to be redundant and unnecessary. Thus, the statute on its face does not require that consideration pass in order to be liable as a successor, successor liability may stand where a person does not sell out a business or stock of goods, but rather when he simply ceases doing business.

Equally compelling is the language used in the regulations. The regulations provide for liability where a successor “purchases, acquires, or succeeds.” Despite our ruling in 08-066 C, the “Rules and Regulations of . . . [an agency] must faithfully reflect the intention of the legislature; when there is clear and unambiguous language in a statute, that language must be given the same clear and unambiguous force and effect in the . . . [agency's] Rules and

Regulations that it has in the statute. Appalachian Power Co. v. State Tax Dep't, 195 W. Va. 573, 587, 466 S.E.2d 424, 438 (1995). Thus, the language of the regulation must be read consistently with the statute. Such a reading unequivocally provides that successor liability may lie where a successor “purchases, acquires, or succeeds.” *See* W. Va. Code R. § 110-15-2 (1993); *See also* W. Va. Code R. § 110-15-4.9.1 (1993). Neither the plain language of the statute or regulation requires consideration to pass from the successor to the predecessor in order to establish successor liability.

Therefore, while the Petitioner is correct that the evidence does not show that any consideration passed from Company A, to Company B, such consideration is unnecessary in determining whether Company A succeeded to the business of Company B.

The Petitioner also argues that the Tax Department engaged in little or no investigation prior to issuing the assessment and no substantive investigation after issuing the assessment⁴. However, a hearing before the office of tax appeals on a petition for reassessment is to be held *de novo*. *See* W. Va. Code Ann. § 11-10A-10(b) (West 2011); W. Va. Code. R. § 121-1-62.5 (2003). Our rules define “*de novo*” by providing that “the office of tax appeals will decide questions of fact and of law based on the evidence and legal arguments presented in the proceedings before the office.” W.Va. Code R. §121.1-2.7 (2003). Additionally, as noted above, in such a hearing the burden of proof is upon the petitioner to show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2011); W. Va. Code. R. §§ 121-1-63.1 and 69.2 (2003). It is insufficient, in the instant matter, for the Petitioner to allege that the investigation performed by the Tax

⁴ The record is unclear as to the extent of the investigation. The Petitioner spent a significant amount of time questioning two Tax Department employees concerning the extent of the investigation, and elicited testimony that the assessment was based on the commonality between the two companies.

Commissioner is insufficient where the evidence presented in this matter clearly establishes liability.

CONCLUSIONS OF LAW

Based upon all of the above, it is **DETERMINED** that:

1. It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. § 11-1-2 (West 2011).

2. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the petitioner to show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2011); W. Va. Code R. §§ 121-1-63.1 and 69.2 (2003).

3. It was the duty of Company B to collect and remit consumers sales and service tax, to pay withholding tax, and to pay Tobacco Products Excise Tax. *See* W. Va. Code R. §110-15-4.5 (1993); W. Va. Code Ann. § 11-21-74 (West 2011); W. Va. Code Ann. § 11-17-5 (West 2011);

4. A successor in business is personally liable for the payment of tax, additions to tax, penalties, and interest unpaid after the expiration of the thirty-day period allowed for payment by the predecessor. *See* W. Va. Code R. § 110-15-4.9 (1993).

5. In order to be determined a successor in business, a person must directly or indirectly purchase, acquire, or succeed to the business or stock of goods of a predecessor. *See* W. Va. Code R. § 110-15-4.9.1 (1993).

6. On its first day of operation, Company A acquired substantially all of the business assets and stock of goods of Company B.

7. Company A (Petitioner) has not carried its burden of proof by showing that the Successor in Business Assessment for consumers sales and service and use tax, withholding tax, and tobacco products excise tax, issued against it on January 10, 2011, was erroneous, unlawful, void, or otherwise invalid.

8. Based upon the above, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the April 16, 2010, Successor in Business Assessment, issued against the Petitioner for a total tax liability of \$_____, is hereby **AFFIRMED**.

Pursuant to West Virginia Law, interest accrues on the assessments until the liabilities are fully paid. *See* W. Va. Code Ann. § 11-10-17(a) (West 2011).

WEST VIRGINIA OFFICE OF TAX APPEALS